Tan Sri Dato' Tajudin bin Ramli & Anor v Technology Resources Industries Bhd

A

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–958–04 OF 2013
DAVID WONG, UMI KALTHUM AND HASNAH HASHIM JJCA
30 JUNE 2016

B

C

Companies and Corporations — Directors — Compensation — Loss of office — Compensation payments and enhancement of remuneration package made to directors — Whether made with sanction of Board of Directors — Whether directors retired or terminated — Whether there was justification for enhancing remuneration package — Whether directors in breach of fiduciary duties — Companies Act 1965 ss 137(1) & (5)

D

The first appellant was the chairman and chief executive while the second appellant was the group executive vice president and director of the respondent. The existing executive chairman's remuneration package was reviewed and the appellants' packages were revised and enhanced. However, when the appellants resigned from the board of directors of the respondent, the remaining directors resolved to terminate the appellants from their employment positions. The respondent demanded from the appellants, inter alia, all payments made to the appellants under the remuneration package but the appellants failed, refused and/or neglected to return the monies paid. The respondents claimed against the appellants at the High Court for the return of incentive payments and compensation payments when they ceased office as directors. The High Court allowed the claim and held that the appellants' remuneration packages were in contravention of the respondent's article of association ('AA'). In this appeal, the appellant argued that they were entitled to the incentive payments, savings and compensation payments.

E

F

G

Held, dismissing the appeal with costs of RM30,000:

H

(1) Section 137(1) of the Companies Act 1965 ('the Act') relates to compensation for loss of office as an officer of the company. The true intent and purpose of the compensation payments were to compensate the appellants for loss of office. The High Court judge correctly concluded that the payments were without sanction of the board and consequently fell within the ambit of s 137(1) of the Act. As provided under s 137(5)(d) of the Act, the exception is not applicable as the compensation payments exceeded the total emoluments of the

I

appellants' three years preceding retirement. The appellants' positions were further exacerbated as they were not retired but they were terminated (see para 46).

(2) The first appellant's new terms of remuneration were not approved by the board of directors', as required by articles 74 and 75 of the AA. There was no justification for the incentive payments as the appellants were merely carrying out the duties entrusted to them as directors of the respondent. The remuneration packages of the appellants were in contravention of the respondent's AA and the payments to the appellants were in breach of the appellants' fiduciary duties (see paras 30, 38 & 41).

[Bahasa Malaysia summary

Perayu pertama ialah pengerusi dan ketua eksekutif manakala perayu kedua ialah naib presiden eksekutif kumpulan dan pengarah responden. Pakej gaji pengerusi telah disemak dan pakej-pakej perayu-perayu telah diubah dan ditambahbaik. Walau bagaimanapun, apabila perayu-perayu meletak jawatan daripada lembaga pengarah responden, pengarah-pengarah yang kekal telah memutuskan untuk menamatkan perayu-perayu daripada jawatan-jawatan pekerjaan mereka. Responden telah menuntut daripada perayu-perayu, antara lain, semua bayaran yang dibuat kepada perayu-perayu di bawah pakej gaji tetapi perayu-perayu telah gagal, enggan dan/atau ingkar untuk mengembalikan wang yang dibayar. Responden-responden menuntut terhadap perayu-perayu di Mahkamah Tinggi untuk pulangan bayaran-bayaran insentif dan bayaran-bayaran pampasan apabila mereka berhenti menjawat sebagai pengarah. Mahkamah Tinggi telah membenarkan tuntutan itu dan memutuskan bahawa pakej gaji perayu-perayu adalah bertentangan artikel syarikat responden ('AS'). Dalam rayuan ini, perayu berhujah bahawa mereka berhak kepada bayaran-bayaran insentif, bayaran-bayaran simpanan dan pampasan tersebut.

Diputuskan, menolak rayuan dengan kos:

(1) Seksyen 137(1) Akta Syarikat 1965 ('Akta tersebut') berkenaan pampasan untuk kehilangan jawatan sebagai pegawai syarikat. Niat dan tujuan sebenar bayaran-bayaran pampasan itu adalah untuk memberi pampasan kepada perayu-perayu untuk kehilangan jawatan. Hakim Mahkamah Tinggi dengan wajar memuat kesimpulan bahawa bayaran-bayaran tersebut adalah tanpa sanksi Pengarah dan akhirnya terjatuh dalam skop s 137(1) Akta tersebut. Sebagaimana diperuntukkan di bawah s 137(5)(d) Akta tersebut, pengecualian itu tidak boleh terpakai kerana bayaran-bayaran pampasan melebihi jumlah emolumen sebelum tiga tahun pesaraan perayu-perayu. Kedudukan perayu-perayu selanjutnya bertambah teruk kerana mereka tidak bersara telah mereka telah ditamatkan (lihat perengaan 46).

(2) Terma baru gaji perayu pertama tidak diluluskan oleh lembaga pengarah, seperti dikehendaki oleh artikel-artikel 74 dan 75 AS. Tiada justifikasi untuk bayaran-bayaran insentif kerana perayu-perayu hanya menjalankan kewajipan yang diamanahkan kepada mereka sebagai pengarah-pengarah responden. Pakej gaji perayu-perayu bertentangan dengan AS responden dan bayaran-bayaran kepada perayu melanggar kewajipan fidusiari perayu-perayu (lihat perenggan 30, 38 & 41).]

Notes

For cases on directors in general, see 3(1) *Mallal's Digest* (5th Ed, 2015) paras 178–450.

Cases referred to

Guinness Plc v Saunders [1990] 2 AC 663, HL (refd)

Legislation referred to

Companies Act 1965 ss 137, 137(1), (5), (5)(d)

Appeal from: Suit No S3–22–370 of 2004 (High Court, Kuala Lumpur)

(Lim Kian Leong & Co) for the appellants.
(Shearn Delamore & Co) for the respondent.

Hasnah Hashim JCA:

INTRODUCTION

[1] This is an appeal against the decision of the High Court in which the learned judge allowed the plaintiff/respondent claim's suit brought against the first appellant/defendant, second appellant/second defendant and the third appellant/defendant for the return of incentive payments pursuant to the corporate restructuring exercise, the return of the compensation payments when they ceased office as directors on 3 July 2002 and the return of the vehicles transferred to the first and second defendants. The third appellant, however, withdrew his appeal prior to the hearing of this appeal.

[2] From a perusal of the appeal records and having read and heard submissions from both learned counsel, there appeared to be no cogent basis for this court to intervene in its appellate capacity. The findings of the learned trial judge were premised on the evidence available to her and could not be said to be implausible. Given the totality of the evidence on record, we were satisfied that there was no judicial misappreciation or evaluation of the evidence.

[3] We set out below our reasons for affirming the decision of the High Court.

[4] The parties will be referred to in their original capacities in the court below.

BACKGROUND FACTS

[5] The plaintiff was a public listed company in the business of providing telecommunications services under the brand known as Celcom.

[6] The first defendant was appointed as a director of the plaintiff on 24 July 1990 and subsequently appointed as the chairman and the chief executive of the plaintiff. The second defendant was the group executive vice president and director of the plaintiff. The third defendant was the senior executive officer and director of the plaintiff.

[7] At the plaintiff's board meeting on 18 February 1998 the third defendant informed the board that a proper study on the executive chairman's remuneration package had never been done and proposed that some members of the board be authorised to look into the matter and decide on the suitable package. The board then authorised the third defendant and another director, Dato' Abdul Rahman bin Hj Ismail to review the existing remuneration package of the first defendant as the executive chairman and to make such decision as they deem fit. By a letter dated 1 June 1998, the third defendant and Dato' Abdul Rahman bin Hj Ismail as members of the remuneration committee notified the first defendant of the new terms of the remuneration to be effective from 1 January 1998.

[8] The first defendant's revised package contained terms with respect to bonus, performance incentive and compensation upon resignation or termination from employment as follows:

> CASH COMPONENTS
>
> 2. Bonus and Performance Incentive:
>
> 1. ...
>
> 2. ...
>
> 3. Performance incentive
>
> An incentive payment of reasonable value shall be paid to you as and when deemed necessary as determined by the Compensation/Remuneration Committee of the Company upon successful implementation of any project and/or exercise of TRI/Celcom and/or the Group, which results in substantial savings or profits to TRI/Celcom and /or the Group. This

incentive shall not in any case be more than 2% of the total savings by and/or profits accruing to TRI/Celcom and the Group.

RESIGNATION/TERMINATION

2. Cessation of employment as Chief Executive:

Cessation of employment as the Chief Executive by reasons including termination or removal from position: or resignation from employment by reason of you or your key members of the management team ceasing to be employed by the Company and/or the Group or ceasing to hold office as directors: shall entitle you to compensation. The compensation shall be a lump sum payment for past services equivalent to your total emoluments in the last 60 (sixty) months. If you cease employment while holding office as director, Section 137 of the Companies Act 1965 shall apply.

[9] The second defendant, who is the brother of the first defendant, was appointed as an alternate director to the first defendant on 7 February 1995 and as director of the plaintiff on 10 June 1996. He resigned as alternate director on 24 April 1997 but remained as the director of the plaintiff. He was appointed as the plaintiff's group executive vice president on 1 May 1997.

[10] The employment package of the second defendant was offered by the first defendant on 25 April 1997. The enhanced remuneration package of the second defendant was offered by the first defendant by a letter dated 29 December 1997 and took effect from 1 January 1998.The enhanced remuneration package included a revised salary, bonus and performance incentive, the provision of a car, driver, medical and insurance benefits. The provision on the performance incentive stipulates as follows:

3. Performance Incentive

An incentive payment of reasonable value shall be paid to you as when deemed necessary as determined by the Chief Executive of the Company upon successful implementation of any project and/or exercise of TRI/Celcom and/or the Group, which results in substantial savings or profits to TRI/Celcom and/or the Group.

[11] Under the enhanced remuneration package there is also a clause on cessation of employment:

Cessation of employment as the Group Executive Vice President by reasons other than the above, including termination: or removal from position: or resignation from employment by reason of cessation of employment of the Chief Executive shall entitle you to compensation. The compensation shall be a lump sum payment for past services equivalent to your total emoluments in the last 36 months.

If you cease employment while holding office as director, Section 137 of the Companies Act 1965 shall apply.

[12] During the 1997 Asian economic recession the plaintiff suffered financial distress. The corporate restructuring and recapitalisation exercise undertaken had rescued the plaintiff from the said financial distress. The first and second defendants were involved in the corporate restructuring and recapitalisation exercise. It was the contention of the defendants that they had played a very significant role in the Project Crystal and therefore entitled to the incentive payments following the successful completion of the Project Crystal as stipulated in their respective remuneration package.

[13] On 4 June 2002 the first and second defendants were respectively paid the incentive payments upon the completion of the restructuring and recapitalisation exercise of the plaintiff. The incentive payments received are as follows:

(a) the first defendant — RM3,412,469.76; and

(b) the second defendant — RM2,275,544.67.

[14] At the board meeting on 3 July 2002 the defendants resigned from the board of directors of the plaintiff. The remaining directors then resolved to terminate the defendants from their employment positions with effect from 4 July 2001. Consequent to the termination the plaintiff paid the following compensation sums:

(a) the first defendant — RM15,761,616; and

(b) The second defendant — RM3,971,775.

[15] The first defendant returned the sum of RM1,153,440 to the plaintiff due to overpayment from the sum of RM15,761,616 on 4 July 2002. The plaintiff also subsequently made payments to the employees provident fund ('EPF') and the Inland Revenue Board for the defendants.

[16] On 16 August 2002 the plaintiff demanded all payments made to all defendants under the remuneration package. The plaintiff also demanded the return of vehicles bearing registration WFB 33 and WFW 383 ('the vehicles') from the first and second defendants and the additional sums paid to their respective EPF's fund and the Inland Revenue Board.

[17] The defendants failed, refused and/or neglected to return the monies paid and the vehicles. The defendants premised their rights to both the incentive and compensation payments on the terms of the enhanced remuneration packages.

[18] The plaintiff's claims are as follows:

(a) the return of the incentive payments made to the defendants pursuant to the corporate restructuring exercise of the plaintiff ('Project Crystal');

(b) the return of the compensation payments made to the defendants when they ceased office as directors at the board meeting on 3 July 2002; and

(c) the return of the vehicles transferred to the defendants.

ISSUES BEFORE THE HIGH COURT

[19] At the trial before the High Court the plaintiff filed a claim against the defendants seeking declarations that the defendants acted in breach of their fiduciary duties to the plaintiff and restitution of various payments as well as the return of two vehicles from the defendants. The plaintiff contended that the payments and benefits paid were not in accordance with the articles of association ('AA') and in contravention of the law.

[20] The first and second defendants filed a counterclaim and contended that they were entitled to payments based on the principle of *quantum meruit* taking into consideration their services and achievements that had benefited the plaintiff.

THE HIGH COURT'S DECISION

[21] The learned trial judge decided that on the evidence the terms of the defendants' enhanced remuneration packages contained in their respective terms of engagement were in contravention of the plaintiff's articles of association ('AA'). The incentive and compensation payments paid to the defendant were in breach of the defendants' fiduciary duties as they were not entitled to receive nor to retain such payments. Her Ladyship found that the first defendant's revised remuneration package was never tabled at any board of directors meeting for approval. Similarly, with regards to the second defendant his remuneration package was also not placed before the board for approval.

[22] The learned trial judge entered judgment as prayed and ordered that the defendants make full restitution of all the monies and benefits received from the plaintiff. The plaintiff's claim for conspiracy, return of the vehicles and the accounts and tracing and constructive trusts reliefs were dismissed. The counterclaim of the first and second defendants were dismissed with costs.

[23] There was no cross-appeal by the plaintiff.

The plaintiff's submission

[24] The plaintiff's claims could be summarised as follows:

(a) that the payments and benefits received by the defendants were not in accordance with the AA of the plaintiff at the time payments were made; and

(b) the compensation payment infringed s 137 of the Companies Act 1965 ('the CA').

The defendants' submission

[25] The crux of the defendants' case were as follows:

(a) the defendants played a vital role in the corporate restructuring and recapitalisation exercise. The defendants were entitled to the incentive payments as stipulated in their remuneration packages; and

(b) the board had authorised the review of the first defendant's remuneration package.

Issues

[26] There were two central issues in this appeal:

(a) whether the defendants were entitled to the incentive payments made to the defendants by the plaintiff for the successful completion of Project Crystal and the savings resulting from the early repayment under the corporate restructuring and recapitalising plan; and

(b) whether the defendants were entitled to the compensation payments made to the defendants by the plaintiff arising from the decision of the remaining directors of the board of directors at the 92nd board's meeting held on 3 July 2002.

DECISION

The incentive payments

[27] We shall first deal with the issue relating to the incentive payments made to the defendants by the plaintiff for the successful completion of Project Crystal and the savings resulting from the early repayment under the corporate restructuring and recapitalising plan. It was contended by the defendants as a result of the restructuring plan the plaintiff was paid in advance with savings of around RM351m. The plaintiff was restored financially and its debt reduced by the repayment of the Eurobonds and Danaharta loan. The first defendant had confirmed the terms and incentive payment percentage for the plaintiff's restructuring and recapitalisation plan at 1% of gross savings if the second defendant was successful in making early repayment to the bondholders and

lenders. The successful advance payment and savings triggered the incentive payments as stipulated in the defendants' enhanced remuneration packages.

[28] Before us learned counsel for the defendants sought to rely on the decision made during the board's meeting held on 18 February 1998 directing the remuneration committee to review the first defendant's existing remuneration package and to make decision in relation thereto as it deemed fit. It was argued by learned counsel for the defendants that the AA permitted such delegation of powers to the remuneration committee to determine the first defendant's remuneration package and make any amendments. The remuneration committee had been properly constituted and was delegated the power to review and determine the new terms of the remuneration of the first defendant. It was further argued that the enhanced remuneration of the first defendant had been disclosed and acknowledged in the plaintiff's 2001 annual accounts. Therefore, it would be inequitable for the board to declare that the committee had acted without authority.

[29] With respect to the second defendant's enhanced remuneration package learned counsel for the defendant's argued that the incentive payment were contractual payment and did not require the approval of the board of directors. Furthermore, the payment of the remuneration of the defendants were in accordance with the prevailing practices of the plaintiff and did not require shareholders' approval. Learned counsel for the defendants contended that the learned judge had erred in holding that enhanced remuneration packages required the board's and shareholder's approval.

[30] We disagreed with the proposition submitted by learned counsel for the defendants that the first defendant and the remuneration committee had acted with authority. The plaintiff's board had only delegated the power to review the first defendants remuneration pursuant to the AA. The first defendant's new terms of remuneration were solely determined by the two directors as members of the remuneration committee without first obtaining the board of directors' approval as required by articles 74 and 75 of the AA. The AA of the plaintiff were amended on 21 June 2009 and under the amended AA the equivalent provisions of articles 74 and 75 are articles 68 and 69 respectively.

[31] Article 74 or 68 of the AA expressly states that any increase of a director's remuneration must be by a resolution passed at a general meeting convened by a notice specifying the intention to propose such increase:

> The remuneration of the Directors shall be such fixed sum (not being a commission on or percentage of profits or of turnover) as shall from time to time be determined by an Ordinary Resolution of the Company and shall (unless such resolution otherwise provides) be divisible among the Directors as they may agree, or failing agreement, equally, except that any Director who shall hold office for part only of

A the period in respect of which such remuneration is payable shall be entitled only to rank in such division for a proportion of remuneration related to the period during which he has held office. The remuneration of the Directors shall not be increased except pursuant to a resolution passed at a General Meeting convened by a notice specifying the intention to propose such increase.

B

[32] Article 75 or 69 of the AA further stipulates:

Any Director who is appointed to any executive office including the office of Chairman or who serves on any committee or who otherwise performs services which in the opinion of the Directors are outside the scope of the ordinary duties of
C a Director, may be paid such extra remuneration by way of salary percentage of profits or otherwise as the Directors may determine but not a commission on or percentage of turnover.

D **[33]** Both the articles clearly provide that any increase of the remuneration of the directors or any extra remuneration must be determined and approved by the board. It would therefore seemed incongruous that the defendants, being seasoned directors themselves, would have omitted to obtain such a resolution from the board.

E

[34] Under the amended AA the equivalent to article 94 is article 88. Article 94 or article 88 of the AA deals specifically with the powers of a committee such as the remuneration committee:

F The Directors may delegate any of their powers to committees consisting of such Member or Members of their body as they think fit and may from time to time revoke such delegation. Any committee so formed shall in the exercise of the powers so delegated conform to any regulations that may from time to time imposed on it by the Directors. The meetings and proceedings of any such committee consisting of two or more Members shall be governed by the provisions herein contained for
G regulating the meetings and proceedings of the Directors so far as the same are applicable thereto and are not superseded by any regulations made by the Directors under this Article.

[35] The remuneration committee after having reviewed the first defendant's
H remuneration did not put the proposed enhanced remuneration before the board for approval as required by the provision of the AA.

[36] The provisions of the AA with regards to the remuneration of the directors must be strictly observed. In *Guinness Plc v Saunders* [1990] 2 AC
I 663, referred to by learned counsel for the plaintiff and accepted by the trial judge, the House of Lords held that the power to pay remuneration under the articles of the company should be strictly followed. The duty to determine the remuneration of directors is non-delegable and only the board can decide whether special remuneration shall be paid in addition to or in substitution for

the annual remuneration. Therefore, any payments of remuneration made outside the ambit of the articles would be in breach of fiduciary duty and must be returned to the company.

[37] The same principles enunciated in *Guinness* applied to the second defendant. The enhanced remuneration package of the second defendant was not brought to the board for approval. The first defendant had no capacity under the provisions of the AA to determine the enhanced remuneration package of the second defendant without placing the proposed enhancement before the board.

[38] Based on the evidence before her, the learned judge found that there was no justification for the incentive payments vis a vis the successful completion of Project Crystal as the defendants were merely carrying out the duties entrusted to them as directors of the plaintiff.

[39] We agreed with the learned judge's finding that the remuneration packages of the defendants were in contravention of the plaintiff's AA and the payments to the defendants pursuant thereto were in breach of the defendants' fiduciary duties.

The compensation payments

[40] Sometime in 2002, Telekom Malaysia Bhd ('TM') approached Danaharta to acquire the shares of the first defendant vested in Danaharta. A notice of requisition dated 17 May 2002 was issued by TM for an EGM to remove four directors which included the defendants and to appoint new directors.

[41] On 3 July 2002 at the board meeting the defendants were all requested to resign from their respective positions namely as directors with effect on the same day. The board accepted their resignation. At the board meeting it was resolved that the compensation for termination/loss of office in respect of past services and incentive payments be paid to the defendants. However, prior to the aforesaid board meeting, arrangements were put into place for the payments to the defendants. In her judgment Her Ladyship made a finding at para 38.4 of as follows:

> Based on the factual matrix of the case, I agreed with the Plaintiff that from the time of TM's acquisition, the Defendants knew of their removal was imminent and steps were taken prior to the 3.7.2002 Board meeting to effect payment to themselves.

[42] Her Ladyship concluded that since the remuneration packages were in contravention of the plaintiff's AA the compensation payments paid was in

breach of the defendants' fiduciary duties and therefore they were not entitled to receive nor retain the said payments.

[43] Learned counsel for the plaintiff argued that the recovery of the compensation payments infringed s 137(1) of the CA which states as follows:

> (1) It shall not be lawful —
>
> (a) for a company to make to any director any payment by way of compensation for loss of office as an officer of that company or of a subsidiary of that company or as consideration for or in connection with his retirement from any such office; or
>
> (b) for any payment to be made to any director of a company in connection with the transfer of the whole or any part of the undertaking or property of the company,
>
> (c) unless particulars with respect to the proposed payment (including the amount thereof) have been disclosed to the members of the company and the proposal has been approved by the company in general meeting and when any such payment has been unlawfully made the amount received by the director shall be deemed to have been received by him in trust for the company.

[44] Such restriction, however shall not apply to the transaction or payments as provided under s 137(5) of the CA:

> (a) any payment under an agreement entered into before the commencement of the relevant repealed written laws;
>
> (b) any payment under an agreement, particulars whereof have been disclosed to and approved by special resolution of the company;
>
> (c) any bona fide payment by way of damages for breach of contract;
>
> (d) any bona fide payment by way of pension or lump sum payment in respect of past services, including any superannuation or retiring allowance, superannuation, gratuity or similar payment, where the value or amount of the pension or payment (except so far as it is attributable to contribution made by the director) does not exceed the total emoluments of the director in the three years immediately preceding his retirement or death; or
>
> (e) any payment to a director pursuant to an agreement made between the company and him before he became a director of the company as the consideration or part of the consideration for the director agreeing to serve the company as a director.

[45] Learned counsel for the defendants argued that the compensation payments were made pursuant to the employment contracts and not as a director of the plaintiff.

[46] Section 137(1) of the CA relates to compensation for loss of office as an officer of the company. What is the test to be applied in determining whether or not the payments amounted to compensation for loss of office? For that purpose one will have to examine the nature and circumstances of the payment. The true intent and purpose of the compensation payments were to compensate the defendants for loss of office as chief executive and group executive. Her Ladyship had considered the facts and evidence before her to determine the true intent and purpose of the compensation and had correctly concluded that the payments were without sanction of the board and consequently fell within the ambit of s 137(1) of the CA. The exception as provided under s 137(5)(d) of the CA is not applicable as the compensation payments exceeded the total emoluments of the defendants three years preceding retirement. The defendants' positions were further exacerbated as they were not retired but were terminated.

CONCLUSION

[47] For the above reasons, we dismissed the appeal of the defendants with costs in favour of the plaintiff and affirmed the decision of the High Court judge. We ordered agreed costs of RM30,000 to be paid by the defendants and the deposit to be refunded.

Appeal dismissed with costs of RM30,000.

Reported by Afiq Mohamad